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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

NO. 875

HENRY TRAVIS SCHNAUTZ,
petitioner

versus

UNITED STATES OF AMERICA,
respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Henry Travis Schnautz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 3, 1959.

CITATION OF OPINIONS BELOW

The District Court did not write or file an opinion. The opinion of the Court of Appeals is printed in

Appendix "B" hereto, infra, pp. 17-26, (R. 238-246). Reported 263 F. 2d 525.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1959 (R. 247, p. 26, infra; opinion R. 238-246, pp. 26, infra). A timely petition for rehearing filed March 9, 1959 (R. 248-251) was denied April 3, 1959. (R. 253).

QUESTIONS PRESENTED

1. (a) It is petitioner's contention that there is no evidence of a conspiracy as alleged in the fourth count of the indictment between the petitioner (defendant) and Ysidro C. Guerra, but that the undisputed evidence shows that the petitioner was merely acting with the government undercover agent, Gjertson, and special employee, Rodriguez, and aiding and abetting them in purchasing the marihuana involved in the first three substantive counts of the indictment.

(b) It is also petitioner's contention that the fourth count of the indictment alleges a general conspiracy between petitioner and Guerra to acquire and transfer marihuana, and to receive, conceal, sell, and facilitate the transportation, concealment and sale of marihuana imported and brought into the United States, and there is no evidence remotely referring to any such general conspiracy, but only to the acquisition by the government agent and special employee of the particular marihuana in-

volved in the first three substantive counts of the indictment.

2. The trial court, over the objection of the defendant, charged the jury that a conspiracy may be proved by overt acts.

It is the petitioner's position that an agreement may not be proven by proving overt acts, but that in order to establish a conspiracy one of the overt acts alleged in the indictment must be proved, and that the agreement itself may not be established by the proof of the doing of certain overt acts.

3. The petitioner contends that, for the following reasons, raised by motion to dismiss (R. 17), the indictment is materially defective. Fourt Count Indictment, Appendix "B", pp. 21-22, infra, R. 3-4).

a. The overt acts set out in the indictment, all alleged to have occurred on February 2, 1957, are not alleged to have occurred after the formation of the conspiracy, which is alleged to have been formed "commencing on or about February 1, 1957 and continuing to and through February 20, 1957." (R.3).

b. The three offenses in the fourth count which are alleged to have been the subject of the conspiracy are offenses requiring a specific intent, and it is essential for a conspiracy count to commit said offenses to allege that the conspiracy was "unlawfully", "knowingly", or "willfully" entered into.

c. The allegation of a conspiracy to do unlawful acts generally without designating specific offenses which it is alleged defendant conspired to violate is insufficient to protect him against double jeopardy.

STATUTES INVOLVED

The statutes involved are 18 *U.S.C., Sec.* 371; 21 *U.S.C., Sec.* 176(*a*); 26 *U.S.C., Sec.* 4742(*a*); 26 *U.S.C., Sec.* 4744(*a*); and 26 *U.S.C., Sec.* 7237(*a*) *and* (*b*). The material portions of the statutes are printed in Appendix "A" hereto, pp. 13-15, infra.

STATEMENT

The First Count of the Indictment charged that defendant on February 2, 1957 acquired 80 ounces of marihuana from some person unknown to the grand jury without paying the transfer tax required by law. (R. 2).

It will be noted that defendant was not charged with having acquired the marihuana from Guerra, who is named as his co-conspirator in the Fourth Conspiracy Count; nor is the 80 ounces referred to in the charging part of the conspiracy count. (R. 3).

The Second Count of the Indictment charged that defendant on February 2, 1957 transferred eighty (80) ounces of marihuana to John A. Gjertson not in pursuance of a written order. (R. 2).

It will be noted this was not the offense charged as the basis of the conspiracy count, inasmuch as John A. Gjertson's name is not mentioned in the Fourth Count; and the 80 ounces is not referred to in the charging part of the conspiracy count. (R. 3).

The Third Count of the Indictment charged that defendant on February 2, 1957 received, concealed, sold and facilitated the transportation, concealment and sale of 80 ounces of marihuana imported into the United States contrary to law. (R. 2-3).

The Fourth Count of the Indictment is printed in Appendix "B", as part of the court's opinion, pp. 17-26, infra. It will be noted that the conspiracy count does not mention the 80 ounces of marihuana referred to in the substantive counts. (R. 2-4).

The defendant was acquitted of the three substantive counts of the indictment and convicted of the fourth conspiracy count. (R. 214 and 217).

In order for the Supreme Court to pass on the question as to whether there is any evidence to support the finding of a conspiracy, the Court must read the evidence. The only testimony in any way bearing on the defendant's guilt of any offense is found in the testimony of the Government undercover agent, John A. Gjertson (R. 25-49); and a narcotic agent, John Frost. (R. 89-98).

The special employee of the government, Rudy Rodriguez, though available, was not called as a witness by the government. (R. 153-155).

The defendant did not testify.

Defendant moved for instructed verdict (R. 105-108); and renewed the motion at the close of all the evidence. (R. 213).

The substance of the testimony in the case against defendant is that the government [illegible]t, Gjertson, and the special employee Rodriguez approached defendant to buy marihuana. Defendant contacted Guerra by phone and arranged for the agent and special employee to make the purchase, and arranged the meeting place. Other than the phone call there is no evidence of any contact between defendant and Guerra. Defendant did not deliver the marihuana, never at any time had pos-

session of it, but the purchase was made by the government agents themselves from Guerra.

The Court of Appeals considers the statements in the footnote to the second page of the opinion as significant in establishing a conspiracy. It is petitioner's position that these statements at most show that defendant merely knew where marihuana could be purchased and that he was able to assist the agents in the purchase, and that it fell far short of establishing a conspiracy and agreement between the defendant and the marihuana dealer.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the prior opinion of the same court in *Lambert v. United States*, (*5th Cir.*) 101 *F.* 2*d* 960. In that case the Court of Appeals held that where the only evidence in the case, and all the evidence, showed that the defendant was acting for the government agents in purchasing the narcotics, a conviction for conspiracy could not be sustained.

The use of conspiracy indictments as an overall need to convict defendants who cannot be convicted of substantive offenses should be closely scrutinized by the Supreme Court in supervising the prosecution of our criminal jurisprudence. This Court should not permit a conspiracy conviction to stand when there is no evidence, either circumstantial or otherwise, of an agreement between the so called conspirators; and the fact that a crime is committed, even one in which defendant participated, should not be permitted to be considered as evidence of a conspiracy to commit the offense.

It is generally recognized that participation in the offense which was the object of the alleged conspiracy does not prove the participant guilty of conspiracy. There must, in addition thereto, be proof of the unlawful agreement. See: *Langer v. United States*, (*8th Cir.*), 76 *F.* 2*d* 817, and cases cited, p. 827. And where the only contact between the alleged conspirators was a phone call it is considered insufficient to establish a conspiracy. See: *Carlson v. United States*, (*10th Cir.*) 249 *F.* 2*d*, 85, 88.

It is thought that the cases of *Duke v. United States*, (*5th Cir.*) 233 *F.* 2*d* 897 and *United States v. DeVasto*, (*2nd Cir.*) 52 *F.* 2*d* 26, cited by the Court of Appeals do not support their opinion, but rather support the contention urged by petitioner.

In a like manner, the Sureme Court should not permit a conviction under an indictment to stand which charges a general conspiracy, when all the evidence in the case bears only upon the commission of a single substantive offense. There was no evidence that defendant entered into any character of general conspiracy, or any transaction other than the one with Gjertson and Rodriguez.

2. The very essence of a conspiracy and proof in support thereof is involved in the erroneous conception of the trial court as to how a conspiracy may be proved. The petitioner's objection and the pertinent part of the charge is set forth in the Court's opinion, Appendix "B", pp. 19-21, infra.

The trial court flatly told the jury that: "A conspiracy may be inferred from circumstances; it may be proven by overt acts. It is seldom that any one act by itself can prove a conspiracy, but a number

of acts considered together may". There is nothing in the trial court's charge which in any way qualifies this.

The effect of the charge in our case is that the jury was told that if defendant had a conversation in Austin with the government narcotics agent, and talked to Guerra on the telephone, and if the defendant went to the home of Guerra, then they could convict defendant of a conspiracy.

There was no evidence of any other overt act alleged in the indictment.

The charge of the court is not the law. It does not meet the requirements as to a conspiracy as set out by the Supreme Court in *Hyde v. United States*, 225 *U.S.* 347, holding overt acts to be part of the conspiracy evidence and not evidence of the existence of the conspiracy, and in *Grunewald v. United States*, 353 *U.S.* 391, holding that for overt acts to be meaningful they must directly evidence the existence of an agreement and conspiracy.

"Proof of an overt act alone is insufficient to prove a conspiracy." See: *Hall v. United States*, (10*th Cir.*) 109 *F.* 2*d* 976, 984; *Bell v. United States*, (8*th Cir.*) 2 *F.* 2*d* 543, 544; *United States v. Grossman*, (*D.C.E.D.N.Y.*) 55 *F.* 2*d* 408; *Dahly v. United States*, (8*th Cir.*) 50 *F.* 2*d* 37, 42; and 15 *C.J.S.*, *p.* 1068, *Sec.* 43*b* (2).

The Court of Appeals concedes that the court's charge was erroneous, but held it was not calculated to confuse the jury.

The Supreme Court should take jurisdiction of this case and establish a rule that will amply protect defendants charged with conspiracies, in those cases

where the alleged overt acts are not unlawful per se and do not point definitely to an agreement. A defendant has no protection except in a correct statement of the law by the court. And the Supreme Court in the exercise of its supervisory powers should vouchsafe to petitioner this important right.

3. Petitioner believes the Supreme Court should grant this petition because of the serious defects in the indictment.

The decision of the Court of Appeals in holding that the defects in the indictment "did not mislead the appellant", is not in harmony with the opinion of the Supreme Court in *Pettibone v. United States*, 148 *U.S.* 197, holding that "conspiracy is one of the crimes requiring a so called 'specific intent'."

The indictment in this case has three serious defects:

a. The overt acts are alleged to have occurred on February 2, 1957. The agreement is alleged not to have been consummated until February 20, 1957.

In *Goulker v. United States*, (*3rd Cir.*) 294 *F.* 275, it is held that if the formation of the conspiracy and the overt act are alleged on the same day, the overt act must be alleged to have been done "afterwards."

In *United States v. Baker*, (*D.C.R.I.*) 243 *F.* 746, where the conspiracy was alleged to have begun on the 1st day of January, 1913, and ended on the 20th day of September, 1913, and the overt act was alleged to have been done on the 20th day of September, 1913, the indictment was held bad on demurrer.

The overt act must be subsequent to the formation of the conspiracy. See: *Hall v. United States*,

(10*th Cir.*) 109 *F.* 2*d* 976, 984; *Marino v. United States*, (9*th Cir.*) 91 *F.* 2*d* 691; and *United States v. Grossman*, (*D.C.E.D.N.Y.*) 55 *F.* 2*d* 408.

Defendant moved to dismiss on this ground. (R. 11).

b. Petitioner believes the correct rule as to allegation of a specific intent in a conspiracy indictment is expressed in *United States v. Ausmeier*, (2*d Cir.*) 152 *F.* 2*d* 349, 367:

"Where knowledge is made an essential element of the substantive crime it must adhere in a charge of conspiracy to commit that crime."

And in *Joplin Mercantile Co. v. United States*, 236 *U.S.* 531, the Supreme Court held that averments in the description of the offense which were objects of the conspiracy do not supply the failure to allege the combination and agreement was "unlawfully," or "knowingly and willfully" entered into.

The rule we are asking the Supreme Court to enforce by granting the petition is stated in *Pettibone v. United States*, 148 *U.S.* 197, as follows:

"The general rule in reference to an indictment is that all material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication."

c. It is the petitioner's position that the indictment is too uncertain to protect defendant from double jeopardy. It does not charge that defendant agreed and conspired to commit any particular offense, but generally that he conspired to violate three

statutes: 26 *U.S.C., Sec.* 4744(*a*); 26 *U.S.C., Sec.* 4742(*a*); and 21 *U.S.C.* 176(*a*).

No specific violation was the subject of the conspiracy. No specific marihuana was involved. No specific person was involved. As to the offense of acquiring, the person was alleged to be some unknown person. As to transferring, the transferee was not named, nor was he alleged to be a person unknown. (R. 3-4).

Petitioner believes the correct rule, which the Court of Appeals refused to follow, is expressed in *Hamner v. United States*, (*5th Cir.*) 134 *F. 2d* 592; *United States v. Deutsch*, (*3rd Cir.*) 243 *F. 2d* 435, 436; and *United States v. White*, (*D.C.S.D.Cal.*) 69 *F. Supp.* 562.

In *Hamner* the indictment charged defendant with a conspiracy to commit an offense against the United States by buying and selling tires for consumption without a rationing certificate. The court held the indictment insufficient.

In *Deutsch* the indictment was held insufficient because it merely alleged a conspiracy to commit offenses against the bankruptcy laws. The indictment also alleged substantive offenses, but the court said it would not be assumed these were the subject of the conspiracy.

In *White*, above, the rule is applied specifically to the question of jeopardy. The indictment alleged a conspiracy to violate *Sec.* 80, *Title* 18 *U.S.C.A.* in that they agreed and conspired to "conceal a material fact by trick, scheme, and device within the jurisdiction of the Department of Justice" namely the matter of detecting and apprehending Mexican

aliens within the United States. The indictment was held insufficient, as not affording protection from double jeopardy.

The Court of Appeals' decision is contrary to these cases. Defendant moved to dismiss on this ground. (R. 14).

The Supreme Court should take jurisdiction and definitely hold that a conspiracy indictment is not sufficient if it merely alleges generally an agreement to violate the law in an indefinite way, but must allege a conspiracy to commit a specific offense.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

(1) 18 U.S.C. 371.

§371. Conspiracy to commit offense or to defraud the United States.

If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) 21 U.S.C. 176a.

§176a. Smuggling of marihuana; penalties; evidence; definition of marihuana.

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

(3) 26 U.S.C. 4742.

§4742. Order forms.

(a) General requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(4) 26 U.S.C. 4744.

§4744. Unlawful possession.

(a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

(5) 26 U.S.C. 7237.

§7237. Violation of laws relating to narcotic drugs and to marihuana.

(a) Where no specific penalty is otherwise provided. Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000.

(b) Sale or other transfer without written order. Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17102

HENRY TRAVIS SCHNAUTZ,
Appellant,

versus

UNITED STATES OF AMERICA
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(February 18, 1959.)

Before TUTTLE, JONES and WISDOM, Circuit Judges.

JONES, Circuit Judge: An indictment in four counts was brought against the appellant. In the first count he was charged with acquiring marihuana without paying the transfer tax as required by 26 U.S.C.A. § 4741(a). The second count charged a transfer of marihuana without a written order on the prescribed form. Count three stated that the appellant received, concealed, sold and facilitated the

transportation of marihuana after its importation into the United States. By count four the appellant and Ysidro C. Guerra, who was not a defendant, were charged with conspiring to commit the following offenses, (1) to acquire marihuana without paying the transfer tax, (2) to transfer marihuana without the written order required by the statute, and (3) to receive, conceal, sell and facilitate the transportation, concealment and sale of unlawfully imported marihuana. He was acquitted of the first three counts and convicted on the fourth count.

The appellant asks us to decide that the evidence was insufficient to sustain the conviction for conspiracy and that a verdict of acquittal should have been directed on his motion. Supporting this claim of error the appellant cites *Lambert v. United States*, 5th Cir. 1939, 101 F. 2d 960, and says that it is controlling of this case. In the Lambert case the Court found that every fact and circumstance in the record pointed to the appellant in that case as being an aider and abettor of the purchaser and no fact or circumstances pointed to him as an aider and abettor of the sellers. Such is not the situation in the case before us. The statements[1] of the appellant to the government agent point to him as being a participant in the sale on behalf of the seller. This specification of error cannot be upheld. *Duke v. United*

[1] "I can get hold of the best stuff you ever laid your eyes on."

"I got to see my connection, and whatever price my connection will give me, I will quote you a price."

"I can get you anything from one pound to a hundred pounds."

"I can't take you to my connection. I'll make the transaction."

States, 5th Cir. 1956, 233 F. 2d 897; *United States v. DeVasto*, 2nd Cir. 1931, 52 F. 2d 26, 78 A.L.R. 336, cert. den. 284 U. S. 678, 52 S. Ct. 138, 76 L. Ed. 573.

In the court's instructions was included the statement that a conspiracy "may be proven by overt acts". The appellant asserts that this is an incorrect statement of the law and that because of the error we must reverse the conviction. This is urged on the theory that the jury might consider the conspiracy proven if the evidence showed that any of the overt acts were committed. The gist of criminal conspiracy is the agreement between the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone*, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128; *Rent v. United States*, 5th Cir. 1954, 209 F. 2d 893. Proof of the commission of an overt act might also be evidence of an agreement among conspirators depending on the nature of the act and the character of the proof. 15 C.J.S. 1145, Conspiracy § 92 d. The portion of the instructions which is the subject of the appellant's complaint is only a part of a sentence included in a quite lengthy charge which, so far as is pertinent here, is set forth in a note.[2] In the consideration of objections to an

[2]"In connection with the conspiracy charged in the indictment, you are instructed that a conspiracy is a combination of two or more persons, by concerted action, to accomplish an unlawful purpose, or some purpose, not in itself criminal, by unlawful means. There are two elements to the offense of conspiracy. One is the agreement or combination on the part of the parties by concerted action to do an unlawful thing, and the other is the doing of some overt act in pursuance of the agreement or combination. An overt act must be a subsequent, independent act from the com-

instruction of the court to the jury, a reviewing court will look to the whole charge and not to the specified part as standing alone and taken out of

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pleted agreement or conspiracy and done to carry into effect the object of the orignal combination. It is not necessary to constitute conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for the unlawful scheme, or that they should directly in words or writing state what the unlawful scheme is to be and the details of the plans or means by which the unlawful combination is to be made effective.

"It is sufficient if two or more persons in any manner, positively or tacitly, come into material understanding to accomplish a common or unlawful design. Of course, a mere discussion between the parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy unless the scheme is assented to and concurred in by the parties in some manner so that their minds meet for the accomplishment of the proposed unlawful act, and unless some overt act is done in pursuance thereof.

"A conspiracy may be inferred from circumstances; it may be proven by overt acts. It is seldom that any one act by itself can prove a conspiracy, but a number of acts considered together may.

"Accordingly, in order for you to convict under this conspiracy count, you must believe beyond a reasonable doubt, first, that an unlawfl agreement or understanding existed between the alleged conspirators, as charged, and, second, that thereafter some one or more of these overt acts were actually committed as charged.

"In this case the indictment charges some seven overt acts. It is not necessary for you to find all of these overt acts to have been done in order to warrant a conviction. If you find that the unlawful agreement or understanding existed as charged in the indictment, and if you further find that thereafter any one or more of the overt acts were committed by one or more of the parties in pursuance thereof, and to effect the object of the conspiracy, that is sufficient to constitute conspiracy. It is for you to determine the real purposes, and motives which actuated the parties in the premises, and you should consider the reasonableness or unreasonableness of all of the evidence bearing on the elements which go to constitute conspiracy."

context. *International Paper Co. v. Busby*, 5th Cir. 1950, 185 F. 2d 790; *Carter v. Atlanta & St. A. B. Ry. Co.*, 5th Cir. 1948, 170 F. 2d 719, reversed on other grounds 338 U. S. 430, 70 L. Ed. 226, 94 L. Ed. 236; *Pasotex Pipe Line Co. v. Murray*, 5th Cir. 1948, 168 F. 2d 661. The particular language on which the appellant bases his assertion of error may not be, standing alone, an accurate statement of the law. When, however, it is considered in context and in the light of the entire charge we conclude that the clause complained of did not confuse the jury nor prejudice the appellant.

The fourth count of the indictment,[3] which is the only one upon which the appellant was convicted, alleges that "commencing on or about February 1, 1957, and continuing to and through February 20, 1957", the appellant and another conspired to com-

[3] "That commencing on or about February 1, 1957, and continuing to and through February 20, 1957, in Travis County, Texas, in the Austin Division of the Western District of Texas, Travis Henry Schnautz, named herein as a defendant and conspirator, and Ysidro C. Guerra, named herein as a conspirator but not as a defendant, combined, conspired, confederated and agreed to commit offenses against the United States, to wit:

"To knowingly and wilfully acquire from some person to the grand jury unknown marihuana without paying the transfer tax imposed thereon by 26 U.S.C. 4741(a), and the said conspirators would then be transferees required by said Section 4741(a) to pay said tax in violation of 26 U.S.C. 4742(a) [4744(a)]; and

"To knowingly and wilfully transfer marihuana not in pursuance to a written order form issued in blank for that purpose by the Secretary of the Treasury, or his delegate, in violation of 26 U.S.C. 4744(a) [4742(a)]; and

"To knowingly, with intent to defraud the United States, receive, conceal, sell and facilitate the transportation, concealment and sale of marihuana after being imported and brought in, the said conspirators then knowing the mari-

mit certain specified offenses, and that "Pursuant to said conspiracy, and to effect the objects thereof" certain overt acts were committed. Six overt acts were set forth and alleged to have been committed on February 2, 1957. In addition to the six overt acts specifically averred, the fourth count included with and as overt acts "the first three counts of this indictment." The first three counts charged the appellant with substantive offenses and stated that they were committed "on or about February 2, 1957." In a motion to dismiss the indictment the appellant urged that the indictment does not definitely allege when the conspiracy was entered into,

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huana to have been imported and brought into the United States contrary to law in violation of 21 U.S.C. 176(a); and

"Pursuant to said conspiracy, and to effect the objects thereof, the following overt acts were committed

"1. On February 2, 1957, Travis Henry Schnautz had a conversation in Austin, Texas, with Narcotic Agent Gjertsen.

"2. On February 2, 1957, Travis Henry Schnautz made a telephone call to Ysidro C. Cuerra in Austin, Texas.

"3. On February 2, 1957, Travis Henry Schnautz went to the home of Ysidro C. Guerra in Austin, Texas.

"4. On February 2, 1957, Narcotic Agent Gjertsen paid $350.00 cash official advance funds to Travis Henry Schnautz in Austin, Texas.

"5. On February 2, 1957, Travis Henry Schnautz acquired eighty (80) ounces of marihuana in Austin, Texas, from some person to the grand jury unknown without having paid the transfer tax imposed thereon by Section 4741(a), Title 26 U.S.C., and the said Travis Henry Schnautz was a transferee required by said Section 4741(a) to pay said tax.

"6. On February 2, 1957, Travis Henry Schnautz then delivered eighty (80) ounces of marihuana to Narcotic Agent Gjertsen not in pursuance of a written order of said Agent Gjertsen on a form issued in blank for that purpose by the Secretary of the Treasury, or his delegate.

"7. And the first three counts of this indictment."

and that the indictment charges that the overt acts were committed prior to the formation of the conspiracy. The purpose of an indictment is to so inform the accused of the offense with which he is charged as to permit him to make his defense and, if subsequently charged with the same offense, to permit him to plead double jeopardy. *Duke v. United States*, 5th Cir. 1956, 233 F. 2d 897; 4 Wharton's Criminal Procedure 506, § 1724. If, in an indictment for conspiracy, there is any vagueness in the averment as to the time of its formation, the time may be fixed and made certain by a reference to the allegations of overt acts. *Toliver v. United States*, 9th Cir. 1955, 224 F. 2d 742; *Rubio v. United States*, 9th Cir. 1927, 22 F. 2d 766, cert. den. 276 U. S. 619, 48 S. Ct. 213, 72 L. Ed. 734. The sufficiency of an indictment is to be tested by practical rather than technical considerations. *Duke v. United States, supra*. There was no error in the refusal of the district court to dismiss the indictment on the ground that the time when the conspiracy was formed was not alleged with sufficient particularity.

The appellant, as one of the grounds for his motion to dismiss the indictment, asserted that it was defective in that it did not expressly charge that the conspirators "unlawfully" entered into the conspiracy and did not charge that they "knowingly and wilfully" entered into the conspiracy. The refusal of the district court to dismiss the indictment on these grounds is claimed by the appellant as an error requiring reversal. The omission from the indictment of the words "unlawfully, knowingly and wilfully". did not mislead the appellant. A conspiracy to enter

into illegal sales and transportation of marihuana could hardly be a lawful enterprise. The charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent. *Williams v. United States*, 5th Cir. 1953, 208 F. 2d 447, cert. den. 347 U. S. 928, 74 S. Ct. 531, 98 L. Ed. 1081; *Burroughs v. United States*, 290 U. S. 534, 54 S. Ct. 287, 78 L. Ed. 484; *Frohwerk v. United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561; *Razete v. United States*, 6th Cir. 1952, 199 F. 2d 44, cert. den. 344 U. S. 904, 73 S. Ct. 284, 97 L. Ed. 698; *Madsen v. United States*, 10th Cir. 1947, 165 F. 2d 507; *Oliver v. United States*, 10th Cir. 1941, 121 F. 2d 245, cert. den. 314 U. S. 666, 62 S. Ct. 124, 86 L. Ed. 533. The failure to charge in the indictment that the conspiracy was entered into "unlawfully, knowingly and wilfully" was not error.

The appellant asserts that error was committed by the trial court by its refusal to hold the indictment bad because it charged a conspiracy to commit three offenses. Each of these offenses was a felony. This being so, it is not necessary that there be a separate count as to the conspiracy to commit each of the substantive crimes. The rule would be otherwise if one of the substantive offenses which was the subject of the conspiracy had been a misdemeanor. *Williams v. United States*, 5th Cir. 1956, 238 F. 2d 215, cert. den. 352 U. S. 1024, 77 S. Ct. 589, 1 L. Ed. 2d 596; *Braverman v. United States*, 317 U. S. 49, 63 S. Ct. 99, 87 L. Ed. 23; *Frohwerk v. United States, supra; Jones v. United States*, 10th Cir. 1958, 251 F. 2d 288, cert. den. 356 U. S. 919, 78 S. Ct. 703, 2 L. Ed. 2d 715.

Finally, the appellant contends, as he unsuccessfully contended in the trial court, that the fourth count of the indictment is defective because of the absence of allegations of a conspiracy to commit specifically designated offenses. In considering this contention we should keep in mind the purposes that indictments are to serve, and the principle that the conspiracy itself is the gist of the crime. Here we do not find any lack of compliance with the requirement that the indictment shall be such as to permit the accused to prepare his defense. It is not necessary to allege with particularity the offenses which are the objects of the conspiracy or to state such objects with the detail that would be required in an indictment for committing the substantive offense. *Wong Tai v. United States*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545; 15 C.J.S. 1117, Conspiracy § 85. The fourth count of the indictment is no model and deserves no place in the form books. Tested, however, by the specifications of error directed against it, we find it sufficient.

The judgment of the district court should be and is AFFIRMED.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana

APR 13, 1959

Record Pages 238 - 246

JUDGMENT.

Extract from the Minutes of February 18, 1959.

HENRY TRAVIS SCHNAUTZ,
No. 17102.

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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Record Page No. 258

ORDER DENYING REHEARING

EXTRACT FROM THE MINUTES OF APRIL 3, 1959.

HENRY TRAVIS SCHNAUTZ,
NO. 17102

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

FILE COPY

FILED
JUN 1 19
JAMES R. BROWNING

No. 875

In the Supreme Court of the United States

OCTOBER TERM, 1958

HENRY TRAVIS SCHNAUTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
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OPINION BELOW

The opinion (Pet. 26) of the Court of Appeals is reported at 263 F. 2d 525.

JURISDICTION

The judgment (Pet. 26) of the Court of Appeals was entered on February 18, 1959. The petition for a rehearing was denied on April 3, 1959 (Pet. 27). The petition for a writ of certiorari was filed on April 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the judgment of conviction.

2. Whether the indictment was sufficient.

3. Whether the court's charge to the jury was correct.

STATEMENT

Following a jury trial, the petitioner was convicted under the fourth count of an indictment which charged him with conspiring with Ysidro C. Guerra, who was not a defendant, to violate the federal narcotic laws (R. 2–4, 214). He was sentenced to a term of imprisonment for two years (R. 218). On appeal, the judgment of conviction was affirmed (Pet. 26).

The evidence showed that a narcotics agent, posing as a heroin dealer who wanted to buy marihuana, was introduced to the petitioner by Rudy Rodriguez, whom petitioner knew (R. 25–29). The petitioner stated that he could arrange a sale of marihuana of the best quality, in any quantity (R. 31). The agent agreed to buy five pounds (R. 31). That evening, the petitioner reported that he had given the order to Guerra's man, Shorty. After a telephone call, the petitioner quoted a price of $70 a pound (R. 33–34). When the agent demurred at paying the money to the petitioner and asked to go along when delivery was made, the petitioner said his man would not deal with him if he showed up with a stranger (R. 34–36). The petitioner said that Mr. Rodriguez could go along since he knew the "connection" (R. 37). Later that evening, Mr. Rodriguez and the agent picked up a package of marihuana in the bushes off a highway (R. 24, 38–43). Some days later, the agent complained to the petitioner about the way in which delivery had been handled. The petitioner said that

when his man saw Mr. Rodriguez he became nervous, but finally took the money and said Shorty would show them where the marihuana was; that Shorty did point it out; and that neither he, petitioner, nor Mr. Rodriguez had tampered with it (R. 44–46). At this meeting the agent said that he was going to Chicago and would then need about a hundred pounds of marihuana. The petitioner agreed to send the marihuana by bus (R. 46–47).

The petitioner was arrested without any further purchases being made. He admitted selling marihuana to the agent, but said that the marihuana belonged to Guerra, and that he made only about $25.00 on the deal (R. 47–49, 94).

The court gave the jury detailed instructions with respect to the necessary elements in establishing the crime of conspiracy, including the necessity of proving *overt acts. In explaining the nature of the proof* necessary to establish the agreement or combination, the court stated:

> A conspiracy may be inferred from circumstances; it may be proven by overt acts. It is seldom that any one act by itself can prove a conspiracy, but a number of acts considered together may.

The petitioner's counsel objected to the instruction that a conspiracy could be inferred from circumstances and might be proved by overt acts (R. 165).

ARGUMENT

1. The petitioner's attack on the evidence is without merit. This Court, in examining the record, must

take the view of the evidence most favorable to the government and must give to the government the benefit of all the inferences which reasonably may be drawn from the evidence. *Glasser* v. *United States*, 315 U.S. 60. The fact that both courts below held that the verdict was supported by substantial evidence is, of course, entitled to great weight here. *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delancy* v. *United States*, 263 U.S. 586, 589–590.

As shown by the record, there was circumstantial evidence of an agreement between the petitioner and Guerra. This evidence consisted of more than the phone call to Guerra. The statements (R. 34–36) made by the petitioner to the agent indicate that there was an active and going conspiracy between the petitioner and Guerra. These statements, furthermore, show that, unlike the situation in *Lambert* v. *United States*, 101 F. 2d 960 (C.A. 5), the petitioner was acting pursuant to agreement with the seller and on behalf of the seller.[1]

2. The sufficiency of the indictment, which the petitioner unsuccessfully challenged before trial (R. 5–17), also presents no issue of merit. The indictment charged a conspiracy between named persons (the petitioner and Guerra) between fixed dates (February 1 to February 20) to commit offenses

[1] The fact that the petitioner was acquitted on the substantive counts does not prevent him from being found guilty under the conspiracy count. The offenses under the substantive aider and abettor count and the conspiracy count were separate and distinct. Cf. *Pinkerton* v. *United States*, 328 U.S. 640, 643–644; *United States* v. *Crowe*, 188 F. 2d 209 (C.A. 7).

against the United States. It then alleged that the offenses were "knowingly and willfully" to acquire and transfer marihuana without paying the tax and not pursuant to an order form, and "knowingly, with intent to defraud" to conceal and transport marihuana. It specified overt acts on February 2 in furtherance of the conspiracy (R. 3–4). The indictment clearly did allege intent. It also did define the agreement with sufficient particularity as to time and parties to protect the petitioner from a second prosecution.

3. The judge's charge to the jury was correct. Of course, the essence of the conspiracy was the agreement, but that agreement may be inferred from circumstantial evidence. *Blumenthal* v. *United States*, 332 U.S. 539, 549. What any party actually did—the overt acts—may properly be considered as part of the circumstances from which the jury can infer agreement. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 789; *United States* v. *Holt*, 108 F. 2d 365, 368–369 (C.A. 7), certiorari denied, 309 U.S. 672.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
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Attorneys.

JUNE 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959